(2)

No. 96-905

Supreme Court, U.S.
FILED
JAN 6 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

THE CITY OF TULSA, OKLAHOMA, a Municipal Corporation,

Petitioner,

vs.

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT L. McCLARY, PHILLIP MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, and BILLY J. RICHARDSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. NANCE
Counsel of Record
DONALD M. BINGHAM
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS
Attorneys for Respondents
502 West Sixth Street
Tulsa, Oklahoma 74119
(918) 587-3161

70290 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

13 pp

QUESTIONS PRESENTED
(According to Respondents)

1. Whether an employee's pay is "subject to reduction" within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a), where the employer stipulated that it has a policy under which the employee's pay is subject to being reduced, but where the employer has never reduced the pay of the employee.

> (a) If not, is such an employee's pay "subject to reduction" within the meaning of the salary basis test if the employer, pursuant to its policy, has reduced the pay of another employee in the same classification?
>
> (b) If the only such pay-reduction occurred prior to the employer becoming subject to the Fair Labor Standards Act, would an employee who entered the same classification after the Act became applicable be non-salaried?

2. Whether the salary basis test, 29 C.F.R. § 541.118(a), may be validly applied to employees of a governmental body whose pay system is not based upon a public accountability law or principle.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statement of Jurisdiction 1

Statement of the Case 1

Reasons for Denying the Writ 1

I. The facts and issues of this case are significantly different from those of *Auer.* 1

II. The second question presented by Petitioner is not before this Court in *Auer.* 5

III. There is no compelling reason for this Court to address the second question presented. 6

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Auer et al. v. Robins, 65 F.3d 710 ..... 1, 2, 3, 5, 6

Avery v. City of Talladega, Ala., 24 F.3d 1337 (11th Cir. 1994) 5

Contents

	Page
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923)	9
McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163, 114 S. Ct. 1188 (1994)	2
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995)	6, 7
Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955)	9
Service Employees Int'l. Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 774, 133 L. Ed. 2d 726 (1996)	7
Statutes Cited:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 201 *et seq.*	5
Other Authorities Cited:	
29 C.F.R. § 541.118(a)	i
29 C.F.R. § 541.118(a)(6)	2

STATEMENT OF JURISDICTION

The jurisdiction of this Court over the second question presented is properly invoked pursuant to 28 U.S.C. § 1254(1). As to the two (2) sub-issues of the first question presented, however, this Court lacks jurisdiction to grant a writ of certiorari, in that neither was decided by the court of appeals to which the writ would issue. *See* Questions Presented (According to Respondents), *supra* at i, Nos. 1(a) and 1(b).

STATEMENT OF THE CASE

Respondents concur in Petitioner's statement of the case except Petitioner's statement that "the issues presented in the present case are nearly identical to the issues presented before this Court in *Auer, et al. v. Robbins, et al.*, No. 95-897." Petition for Writ of Certiorari, p. 6. As discussed *infra*, only the first question presented by Petitioner (and, arguably, only part of that question) has been briefed by both sides in *Auer.*

REASONS FOR DENYING THE WRIT

I.

THE FACTS AND ISSUES OF THIS CASE ARE SIGNIFICANTLY DIFFERENT FROM THOSE OF *AUER.*

The only reason offered by Petitioner to support the issuance of a writ of certiorari is that this case presents issues substantially similar to those pending in *Auer.* Because the facts and issues in *Auer* are clearly dissimilar to those in the instant record, however, this Court's consideration of *Auer* does not merit the granting of Petitioner's request.

In *Auer,* the Eighth Circuit held that "the mere possibility of an improper deduction in pay does not defeat an employee's salaried status." *Auer,* 65 F.3d at 710, citing *McDonnell v. City of Omaha,* 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied,* 510 U.S. 1163, 114 S. Ct. 1188 (1994). The police sergeants in *Auer* were able to establish initially that one improper deduction had been made from the salary of one sergeant. However, the Eighth Circuit applied the "window of correction" provided in 29 C.F.R. § 541.118(a)(6) to nullify the effect which that particular deduction would have had upon the sergeants' salaried status. The court stated, "Under the *unique circumstances* surrounding Sergeant Guzy's disciplinary loss of pay, we believe that the Department made a *one-time deduction*, and did not make the disciplinary deduction from Sergeant Guzy *pursuant to an established policy*." *Auer,* 65 F.3d at 711 (emphasis added). The Court also found that "the Guzy disciplinary incident was a one-time incident that can never reoccur [sic] because the Department has since changed its policy." *Auer*, 65 F. 3d at 711.

In the present case, the Tenth Circuit not only found that Respondents were subject to reductions in pay for disciplinary reasons, pursuant to an express policy of Petitioner, Pet. App. A-19 to A-20, but also cited "uncontroverted evidence that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance." Pet. App. A-23. (internal quotation marks omitted)

Petitioner argued on appeal that the "window of correction" provided by 29 C.F.R. § 541.118(a)(6) saved its claimed exemptions. The Tenth Circuit noted that this argument had not been raised in the district court and properly held that "issues raised for the first time on appeal will not be reviewed except for the most manifest error." Pet. App. A-24 to A-25. The Tenth Circuit also held, "Even if we were to consider the City's argument, we find no merit to it." Pet. App. A-25.

The Tenth Circuit cited *Auer* as authority that the "window of correction" is not available if the employer has a settled policy of making improper deductions from compensation. Pet. App. A-25 (citing *Auer*, 65 F.3d at 711). The court noted that "the City has at least *one settled policy* of making improper deductions from the Plaintiffs' compensation (*i.e.*, deductions from pay for disciplinary infractions), and is not entitled to the 'window of correction.'" Pet. App. A-25. (emphasis added)

The fact-differences between *Auer* and the present case are apparent and material. In *Auer*, the court found that the public employer did not have a "settled" policy authorizing pay-deductions for disciplinary reasons, and found that the public employer had clarified its unsettled policy to prevent a recurrence of any improper deduction. Here, the Tenth Circuit found that Petitioner has a "settled policy of making improper deductions . . . for disciplinary infractions." Pet. App. A-25. Petitioner did not argue on appeal (or assert in its Petition) that it has clarified or modified that policy.

In *Auer*, the court nullified, by application of the "window of correction," the only pay-deduction which could have entitled the plaintiffs to status as non-exempt employees, whereas in this case, the Tenth Circuit found that (a) Petitioner had failed to raise the "window of correction" argument in the district court, and (b) even if the issue had been properly preserved for appeal, Petitioner could not validly invoke the "window of correction" defense because Petitioner did not maintain that any pay-deduction for disciplinary reasons had been done on a one-time basis or unintentionally. Pet. App. A-25.

This Court may affirm *Auer* by holding that although an actual deduction from pay pursuant to a settled policy is required to establish that an employee is non-salaried, the plaintiffs in *Auer* showed neither the existence of a settled policy nor any

actual deduction based upon such policy. Such a holding by this Court would not cause a different outcome in the present case upon remand to the Tenth Circuit: Respondents established *by stipulation* the existence of the settled policy of making improper pay-reductions for disciplinary infractions **and** the existence of actual deductions for such infractions.

Petitioner may be asking this Court to grant certiorari upon a sub-issue of its first question: If one employee in a particular job-classification has suffered, in accordance with the employer's policy, a pay-reduction for a minor disciplinary infraction, is every person working in that classification "non-salaried"? This sub-issue was not discussed by the Tenth Circuit, and it is not clear that Petitioner raised it sufficiently.[1]

The second sub-issue in Petitioner's first question is the Tenth Circuit's reliance on actual deductions made prior to the FLSA's application to public employers. This sub-issue was not discussed by the Tenth Circuit, and it is not clear that Petitioner raised it sufficiently.[2] Petitioner has not offered any independent reason for this Court to consider either sub-issue.[3]

---

1. Nowhere in its opinion does the Tenth Circuit identify this sub-issue as a matter asserted to be error. In discussing the docking of pay for disciplinary infractions, the court concludes that Petitioner's complaint about the disciplinary aspect of the salary basis test is *pro forma*: "Significantly, the City has not challenged the court's factual findings on this issue or the court's legal conclusion." Pet. App. A-23. The district court's opinion gives no indication that Petitioner raised this sub-issue.

2. *See* footnote 1.

3. Although Petitioner asserts that there is a conflict among the circuit courts of appeal regarding the first question presented, only one circuit has decided the effect of disciplinary deductions taken from the pay of fewer

(Cont'd)

The Tenth Circuit reviewed *Auer* knowing that certiorari had been granted by this Court.[4] Contrary to Petitioner's argument in footnote 4 of its Petition, the issues in *Auer* do not suggest that the Tenth Circuit would reverse itself if this Court affirms *Auer* and remands the present case for re-consideration in light of the affirmance.

II.

THE SECOND QUESTION PRESENTED BY PETITIONER IS NOT BEFORE THIS COURT IN *AUER*.

Again, the only argument offered by Petitioner is that the issues presented in its Petition concern substantially the same issues raised in *Auer*. Although Petitioner's second question (*i.e.*, applicability of the salary basis test to public employees) was initially presented by the petitioners in *Auer*, it was not briefed by both sides.[5]

(Cont'd)

than all plaintiffs or from the pay of non-plaintiffs. *See Avery v. City of Talladega, Ala.*, 24 F.3d 1337, 1342 (11th Cir. 1994) (suspension without pay of one police lieutenant nullified not only his salaried status but that of other lieutenants as well). No circuit has decided how remote in time actual deductions may be and still qualify as events that affect the status of an employee entering the same classification as those employees who suffered the actual deductions.

4. This Court granted certiorari in *Auer* on June 24, 1996. The Tenth Circuit rendered its decision in this case on September 13, 1996. The Tenth Circuit cited the Eighth Circuit's opinion in *Auer*, noting this Court's grant of certiorari. Pet. App. A-25.

5. The petitioners in *Auer* preliminarily set forth the question "Does the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, ("FLSA") salary basis test of 'white collar' FLSA exemptions apply to public employees?" (petition

(Cont'd)

Given that this issue has not been squarely presented in *Auer,* Petitioner's argument that this Court should grant certiorari on its second question because a similar issue is involved in *Auer* must fail. Petitioner has not presented any independent reason for this Court to grant certiorari on its second question.

III.

THERE IS NO COMPELLING REASON FOR THIS COURT TO ADDRESS THE SECOND QUESTION PRESENTED.

The second question presented by Petitioner involves the applicability of the salary basis test to public employees. Petitioner has offered no reason to grant certiorari on this issue other than Petitioner's mistaken belief that this Court is considering the same question in *Auer.* In the last paragraph of the Petition, it is contended that there is a conflict among the circuits regarding whether the salary basis test constitutionally applies to the public sector. Petition, p. 9. Petitioner, however, has offered no authority or analysis to support this contention.

All circuits that have considered Petitioner's second question have upheld the validity of the current salary test as applied to public employers. The Tenth Circuit noted that "only the Seventh and Ninth Circuits have considered similar challenges to the validity of the salary test." Pet. App. A-9. The Seventh Circuit in *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), petition for certiorari filed October 10, 1995 (No. 95-586), held

---

(Cont'd)

for writ of certiorari in *Auer,* p. i) but did not argue it in the body of their petition or in their brief on the merits. The respondents in *Auer* did discuss this sub-issue in their brief on the merits. The Eighth Circuit in *Auer* pointed out that neither side had raised this particular question. 65 F.3d at 710 n.6.

that the current salary basis test is rationally related to the objectives of FLSA and therefore valid. 54 F.3d at 442. The Tenth Circuit in the present case agreed with the holding in *Mueller.* Pet. App. A-11. The Ninth Circuit in *Service Employees Int'l. Union, Local 102 v. County of San Diego,* 60 F.3d 1346 (9th Cir. 1994), *cert. denied,* __ U.S. __, 116 S. Ct. 774, 133 L. Ed. 2d 726 (1996), also upheld the validity of the current salary basis test. *Service Employees,* 60 F.3d at 1353 ("The 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability.").

The Ninth Circuit did, however, hold in *Service Employees* that the salary basis test as it existed prior to September 6, 1991 (the date on which the DOL issued its final interim regulation) is invalid as applied to public sector employers. The Court opined that "because virtually all public employers are constrained by a pay system based on public accountability, most public employees could not satisfy the salary test as it existed prior to September 6, 1991." *Service Employees,* 60 F. 3d at 1352.

The Tenth Circuit in the present case disagreed with the Ninth Circuit's invalidation of the salary basis test as it existed prior to September 6, 1991, because the Tenth Circuit declined to adopt the presumption that the pay systems of governmental bodies are based on public accountability laws or principles. Pet. App. A-11. The Tenth Circuit specifically noted that Petitioner had not shown its own system to be predicated on any public accountability law. Pet. App. A-14. Petitioner's second question asks whether the salary-basis test is applicable to the public sector, but Petitioner failed to lay the evidentiary foundation necessary to resolve this question in its favor.

Petitioner argued to the Tenth Circuit that application of

the salary-basis test to its employees is invalid because a public employer whose pay system is based upon a public accountability law or principle is required to make a deduction whenever an employee is absent for part of a day, yet the "docking" aspect of the salary-basis test erroneously presupposes that all public employers have the option not to make such deductions.

Both in the district court and in the Tenth Circuit, however, Petitioner failed to present sufficient evidence that its pay system is based upon a public accountability law or principle. "After our review of the record, we agree with the district court that the City failed to satisfy its burden of demonstrating its pay system is based upon a public accountability law or principle." Pet. App. A-14. The Tenth Circuit noted "the uncontroverted evidence in this case indicates that salary deductions are discretionary on the part of the City." Pet. App. A-15. Petitioner does not qualify as a public employer caught between (1) an externally-imposed pay system requiring a deduction from pay for every part-day absence and (2) the salary-basis test which requires payment of overtime wages if employees are subject to such deductions.

Some public employers may find themselves in an anomalous situation where a state or local law mandates the very deductions which, under the salary basis test, destroy the exempt status of employees. Petitioner failed, both in the district court and on appeal, to establish that its own pay system poses such a dilemma.

CONCLUSION

Petitioner has not presented any compelling reason for the issuance of a writ of certiorari. The present case is not one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712, 714 (1923). This Court "does [not] sit for the benefit of the particular litigants," and certiorari will be granted only to reach "a problem beyond the academic or episodic." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1955).

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT A. NANCE
Counsel of Record
DONALD M. BINGHAM
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
Attorneys for Respondents
502 West Sixth Street
Tulsa, Oklahoma 74119
(918) 587-3161